

STATEMENT OF

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On behalf of

THE AMERICAN ANTITRUST INSTITUTE

at the Hearing on

THE AMERICA ONLINE/TIME WARNER MERGER

before the

COMMITTEE ON

COMMERCE, SCIENCE, AND TRANSPORTATION

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I am Robert H. Lande, the Venable Professor of Law at the University of Baltimore School of Law, currently on leave as the Senior Research Scholar at the American Antitrust Institute.¹ Thank you very much for allowing me to present the views of the American Antitrust Institute on the America Online (AOL)/Time Warner merger.

Media mergers have long been front-page news, particularly since AOL and Time Warner announced their intention to combine. Even more significant, however, has been the speculation that this merger has caused: if the AOL/Time Warner, and now the Time Warner/EMI, transactions are consummated, similar media mergers can be expected. There is even a possibility that this merger will cause a wave of media mergers so large that, within a decade, most of our information may be supplied by perhaps six of these huge media conglomerates and a fringe of smaller firms.

Today, before this has come to pass, is the time to pause and ask two critical questions. Is this kind of media oligopoly the place where we, as a society, want to end up? And if not, can the antitrust laws effectively prevent the threatened wave of mergers? The answers to the first question

¹ The American Antitrust Institute is an independent educational, research and advocacy organization. See www.antitrustinstitute.org.

is clear. We do not want to permit mergers until there is only a handful of large media firms left. The answer to the second question, however, is far less certain. But I optimistically believe that the antitrust laws, if they are enforced vigorously and interpreted properly, can prevent this from happening.

We should distrust a media oligopoly because it is an undue concentration of control in the hands of a few individuals. It should be stressed that this control need not manifest itself as a price rise for the daily newspaper or in AOL's monthly fee. Rather, it could consist of a change in editorial viewpoints, a shift in the relative prominence of links to certain websites, a bias against certain forms of entertainment, or a decision not to cover certain topics because they are not "newsworthy." In each of these ways mergers could significantly undermine diversity of offerings and, ultimately, consumer choice.²

All of these problems can exist without any improper intent on the part of the media barons. Even if they try to be fair and objective they will necessarily bring their own worldview to the job. And in time some of these media

² The kinds of bias that could arise in this area could be especially troublesome because consumers might never know that the biasing has occurred. When a reader or viewer never learns about news events or particular editorial perspectives, he or she might not look to other sources for them. The readers or viewers often would have no reason to suspect that they have been deprived of a diversity of choices.

conglomerates surely will come into the hands of people who are not interested in being fair or objective.

Which brings us to the antitrust laws.

At first it might appear that the antitrust laws can be of little help in grappling with the issues presented by AOL/Time Warner/EMI. The antimerger laws are today commonly understood as protecting price competition, and a relatively small number of firms - to greatly oversimplify, let's say at most half a dozen - are normally thought to be enough to keep a market price-competitive.³ Six firms (or even four) may be sufficient to make and sell pig iron or aspirin competitively because these products are relatively homogeneous and much of what we care about is related to product price.

But a handful of media firms would not be sufficient for the diversity of viewpoints in a democracy. Would any member of this committee feel comfortable if there were only six media viewpoints left in this nation? Would you be reassured if I guaranteed you that these remaining media conglomerates

³ In industry after industry firms merge until there is only a handful left, and the antitrust authorities often are unable to do anything about it. In these industries the merging parties usually assert that the government is unable to demonstrate that there will be any likely price effects from the merger at issue. On this basis the merger often is permitted. In former years mergers were governed by an **A** incipency@ standard, where mergers were prevented well before they would lead to the point where anticompetitive problems were likely. This concept, however, has faded in recent years.

would sell their newspapers and Internet advertisements at competitive price levels? Of course not.

But the key question is: are these considerations too nuanced for antitrust to consider? Would this be a wrong without a remedy? The answer to this question is unclear. I believe, however, that the antitrust laws, if correctly and vigorously interpreted, should be adaptable enough to meet this challenge.

Antitrust is not exclusively about price. It is essentially about choice -- about giving consumers a competitive range of options in the marketplace so consumers can make their own, effective selection from the market's offerings.⁴ A number of Supreme Court decisions have made it clear that under the antitrust laws consumer welfare consists

⁴ See, e.g., *FTC v. Indiana Fed'n. of Dentists*, 476 U.S. 447, 459 (1986) (An agreement limiting consumer choice ... cannot be sustained...); *Allied Tube & Conduit Corp. v. Indian Head, Inc.* 486 U.S. 492, 499 n.5 (1988) (observing that the challenged activity might deprive some consumers of a desired product...); *Bates v. State Bar of Arizona*, 433 U.S. 370 n.20 (1977) (The public is entitled to know the ...useful information that will enable people to make a more informed choice....); *United States v. Continental Can Co.*, 379 U.S. 441, 455 (1964) (A price is only one factor in a user's choice....). Many lower courts also make this point. See, e.g., *United States v. Brown Univ.*, 5 F.3d 658, 676 (3rd Cir. 1993) (characterizing the crucial issue as whether the challenged practice actually enhances consumer choice.); *Berkey Photo v. Eastman Kodak*, 603 F.2d 263 (2nd Cir. 1979) (crucial issue is whether A the free choice of consumers is preserved); *Butler Aviation Co. v. Civil Aeronautics Board*, 389 F.2d 517, 520 (2nd Cir. 1968) (analyzing effect of corporate acquisition on consumer choice).

of much more than low prices.⁵ The purpose of the antitrust laws is to give consumers the ability to choose freely from among the options that the free market would provide to them.⁶ Consumers should be able to make their choices along any dimension that is important to them -- including price, quality, and editorial viewpoint.

In most cases price competition is a reasonable surrogate for effective consumer choice and diversity. If a market is price-competitive but consumers want a wider range of models or options, the competing manufacturers normally will extend their product lines. Soft drink consumers who want orange soda will get it, and it does not matter whether the orange soda is made by a firm that also makes colas, or even by an orange juice or beer company. No harm, no foul. A series of mergers that would leave only a handful of significant beverage manufacturers might well not offend the antitrust

⁵ See supra note 4.

⁶ Id. For a more thorough discussion see Neil W. Averitt & Robert H. Lande, *A Consumer Choice: The Practical Reason For Both Antitrust and Consumer Protection Law*, 10 Loyola Consumer L. Rev. 44 (1998); Neil W. Averitt and Robert H. Lande, *A Consumer Sovereignty: A Unified Theory of Antitrust And Consumer Protection Law*, 65 Antitrust L.J. 713 (1997).

⁷ This is, of course, a greatly oversimplified analysis. The antimerger statute is worded in terms of preventing mergers the effect of which *may* be substantially to lessen competition, or to tend to create a monopoly. 15 U.S.C. Sec. 18 (1999). To perform the analysis correctly many factors would have to be examined, including the relevant market shares, industry concentration trends, and the innovative potential of the remaining firms.

laws.⁷

But some types of consumer choice and some types of nonprice competition cannot be satisfied this way. Communications media compete in part by offering independent editorial viewpoints and an independent gatekeeper function. Six media firms cannot effectively respond to a demand for choice or diversity competition by extending their product lines because the new media products will inevitably bear, to some degree, the perspective of their common corporate parent.⁸ For these reasons competition in terms of editorial viewpoint or gatekeeping can be guaranteed only by ensuring that a media market contains a larger number of firms than may be required in other, more conventional markets. The number

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⁸ An important but subsidiary question is, ~~A~~who is the real or effective gatekeeper~~@~~ concerning particular issues? Even an independently owned newspaper has several potential gatekeepers or viewpoint promulgators - its writers, editors, and publisher. A large conglomerate like AOL/Time Warner would have its CEO as its ultimate gatekeeper. Nevertheless, on particular issues different people within the organization would, as a practical matter, have gatekeeping or viewpoint functions. Despite this possibility of decentralized decisionmaking, however, for merger evaluation purposes there should be a presumption that a media firm's CEO is the gatekeeper for every part of that firm.

of media firms necessary to ensure effective variety, diversity or choice competition is significantly larger than that required to preserve price competition.⁹

Of course, how this general principle affects the legality of any specific transaction depends upon the facts of the case.

The AOL/Time Warner merger is the first major merger between the Aold@ and Anew@ media genres. Before this merger the @new@ media - of which AOL is probably the premier example - had started to provide more and more competition for the Aold@ media as people increasingly obtain their news and editorial viewpoints over the Internet. In many respects this is a merger of converging types of media since AOL is in the Internet access business and Time Warner owns cable systems, and cable increasingly is being used for Internet access.

This merger raises antitrust issues that I lack the factual basis to answer at this time. For example, does AOL compete in a relevant market that can best be defined as A access to the Internet@? Or should its market be defined more narrowly, as a market consisting of access to the Internet and also the network of chat rooms and other proprietary content that AOL provides? Should Ahigh speed access to the Internet@ be considered a separate relevant market?

⁹ This interpretation of the antitrust laws is, moreover, consistent with fundamental First Amendment principles.

If the relevant market for merger purposes is All forms of access to the Internet,@ then AOL's market share is not unduly large (a reported 25%) and entry is relatively easy. Even if the postmerger AOL/Time Warner firm would attempt to steer AOL users towards Time Warner publications, in light of AOL's non-dominant market share and easy entry it is unlikely that this would detrimentally affect consumers. If the market consisting of chat rooms, etc. is the more meaningful one, however, then the possibility of anticompetitive effects from this merger increases because AOL might well have significant power within this market. AOL might be able to use its market power to distort consumer choice in a manner that favors Time Warner publications anticompetitively.¹⁰ Other antitrust issues could arise in a relevant market consisting of Ahigh speed access to the Internet.@ If, in a few years, Time Warner will have a very large share of this market in certain areas of the country through its cable systems, and if AOL is regarded as one of the most likely potential entrants into this market, then the AOL/Time Warner merger could serve to forestall this entry.

The FTC is currently collecting the information that will enable it to make these crucial determinations. Nevertheless, there are some things that are already clear. An antitrust

¹⁰ AOL could bias its links or screens analogous to the manner in which the some airline reservations systems allegedly were biased during the 1980s.

analysis of the AOL/Time Warner merger must stress two issues in addition to the crucial choice and diversity issues discussed above: the possibility that this merger will spark a trend to similar mergers, and the effects of the web of interrelationships that already exist in this industry.

The January 24, 2000 issue of Business Week has a insightful article titled "So Who's Next: They're all looking at each other."¹¹ This piece provides an overview of how, due largely to the AOL/Time Warner merger, a virtual tidal wave of mergers between "old" and "new" media could occur. Among the firms rumored to be interested in large mergers (although not necessarily with each other) are AT&T, Yahoo, Microsoft, Disney, Viacom, News Corp. (owner of Fox) - in fact, just about every media conglomerate is wondering whether they are going to be left behind by the AOL/Time Warner merger.¹² Look at the January 11, 2000 Wall Street Journal - or, it seems, almost any other day's edition - for other rumors or possibilities.

If AOL/Time Warner goes through, copycat media mergers are certainly likely. A traditional concern of merger enforcement is whether the merger being evaluated is likely to

¹¹ See Steve Hamm & Steve Rosenbush, "So Who's Next? They're All Looking at Each Other," Business Week, Jan. 24, 2000 at 46.

¹² Id.

¹³ See Robert Pitofsky, Chairman, Federal Trade Commission, "The Nature and Limits of Restructuring in Merger Review," Cutting Edge Antitrust Conference, Law Seminars International, Feb. 17, 2000, Empire Hotel, New York, N.Y., at

spark a trend to concentration in the affected industry.¹³

This concern should be taken very seriously by the FTC and the courts when they evaluate the legality of the AOL/Time Warner merger.¹⁰

Moreover, the only way to accurately assess the effects of this merger on the firms' independent editorial and gatekeeper functions is to evaluate the AOL/Time Warner merger in light of the large number of important media joint ventures that already exist.¹¹ Firms often behave differently towards firms with whom they have important joint ventures. Their incentives to engage in hard competition with these firms can diminish. A complex merger like AOL/Time Warner cannot be properly evaluated unless this preexisting web of interrelationships throughout the industry is taken into account.

Am I convinced that the interpretation of the antitrust laws described above is the one that will be applied by the enforcement agencies and the courts, and that it will prevent

6-7 (discussing how the possibility that a merger will causing a merger wave can effect the analysis of that merger).

¹⁰ How many mergers constitute a merger wave? There is no magic answer to this question, or to the question of when the enforcers and the courts should block a merger because it is likely to be anticompetitive. The enforcers and the reviewing courts will have to analyze the facts of each merger carefully and at some point they may decide that a particular merger is likely to be harmful.

¹¹ For example, AOL has major ongoing projects with Nokia, Hoover, DME Interactive, Onvia.com, Sprint PCS, Motorola, BellSouth, Kinko's and MarketWatch.com.

all the important problems that could arise from media mergers? Frankly, I am not entirely optimistic. What is needed at this point is a much more thorough look at the challenges that will be raised by future media mergers. This is particularly true for mergers like AOL/Time Warner which involve different types of media that are in the process of converging.¹²

I therefore urge Congress to create a Temporary Committee to Study Media Mergers and Media Convergence. This Committee could include Members of the Senate and the House who have relevant expertise, the heads of the FTC, FCC, and DOJ Antitrust Division, heads of companies engaged in the affected sectors, and representatives of consumer groups and other public interests most affected by media mergers. The Committee's purpose should be to identify problems that may be caused by large media mergers and by media convergence, and to propose appropriate remedies. If the Committee concludes that the existing laws cannot prevent the problems that plausibly could arise, then it should recommend to the Congress that new legislation should be enacted.¹³

In conclusion, I would like to reiterate the concern that

¹² Many different types of media are in the process of converging. For example, Internet access (one of AOL's market) and Cable T.V. (part of Time Warner's domain) are likely to converge soon.

¹³ The Committee should be directed to complete its work within a short period - a year or two - to ensure that possible problems could be prevented.

the AOL/Time Warner mergers could lead to a wave of media mergers that could cause an unhealthy level of concentration in this crucial industry. It is uncertain, however, whether the antitrust laws could be used to stop this trend before it becomes anticompetitive. I have outlined the ways in which the antitrust laws could be enforced and interpreted so they are likely to stop some or many of the most dangerous large media mergers. I am not suggesting that under today's antitrust laws there is or should be a higher bar or a special rule for media mergers. I am only suggesting the careful yet aggressive application, to special circumstances, of the single universal rule of antitrust. And that rule is to preserve for consumers a truly competitive range of choices in the marketplace.

However, it is far from certain whether the courts would interpret these laws in the vigorous manner I have described. For this reason Congress should establish a temporary Commission to study the potential problems that could arise from media mergers. I greatly appreciate the Committee's invitation to present these views here today.